

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

**FILED**

APR 18 2018

Clerk, U.S. District Court  
District Of Montana  
Missoula

LENNY RUSTAD,

Plaintiff,

vs.

BANK OF AMERICA  
CORPORATION and BANK OF  
AMERICA, N.A.,

Defendants.

CV 16-72-M-DLC

ORDER

Before the Court is Plaintiff Lenny Rustad's ("Rustad") Motion to Dismiss Without Prejudice (Doc. 25). Rustad contends that out of concerns for judicial efficiency and minimizing expense to the parties, this matter is better litigated in conjunction with Rustad's pending Montana state case in Deer Lodge County, *Bank of New York Mellon v. Rustad*, Cause No. DV-17-56 (Mont. 3d Dist. Ct. Mar. 9, 2018) (the "State Court Action").

Federal Rule of Civil Procedure 41(a)(2) permits a plaintiff, with the approval of the court, to dismiss an action without prejudice at any time. After the filing of an answer, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1389 (9th Cir.

1986). “A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result.” *Smith v. Lenches*, 263 F.3d 972, 975–76 (9th Cir. 2001) (citations omitted). When facing a voluntary dismissal request, the Ninth Circuit has emphasized that “each case must be determined on its own particular facts.” *Blue Mountain Constr. Co. v. Werner*, 270 F.2d 305, 306 (9th Cir. 1959).

Rustad filed this suit on June 8, 2016, alleging misconduct by Defendants Bank of America Corporation and Bank of America, NA (“BANA”) in their servicing of his mortgage. The mortgage at issue in this litigation was held by Bank of New York Mellon (“BONY”) and serviced by BANA through an agreement between the two banks. On August 27, 2017, BONY served Rustad with a lawsuit it filed against him in Montana state court regarding the same mortgage. Rustad claims that the issues in both cases involve the same mortgage and are inextricably intertwined, so they should be litigated together out of judicial efficiency. (Doc. 26 at 4–6.) Rustad further argues that Defendant BANA will suffer no prejudice by defending itself in the State Court Action instead of this federal suit. (*Id.* at 7.)

BANA counters that this lawsuit and the State Court Action do not arise from the same transaction or occurrence, involve two separate bank entities, and

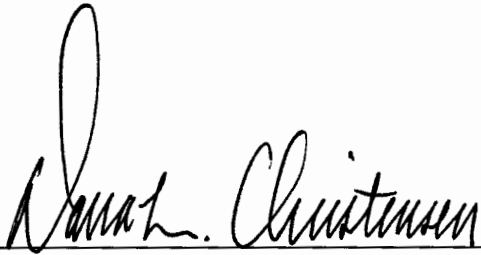
Rustad's claims against BANA and BONY are not the same in both actions. (Doc. 28 at 3–5.) BANA argues that Rustad's Motion to Dismiss is merely an attempt to escape federal jurisdiction and is motivated by forum shopping. (*Id.* at 6.) BANA also contends that a dismissal would be prejudicial because federal court offers several advantages and protections that are not available to BANA in state court, and that BANA would not be afforded its right to a federal forum. (*Id.* at 8–10.) Further, BANA argues that if the Court grants the voluntary dismissal, Rustad should be ordered to pay the costs and fees of BANA's federal litigation thus far pursuant to Rule 41(d)(1).

After the parties fully briefed the Motion to Dismiss, BANA filed a Notice of Supplemental Authority with the Court. (Doc. 30.) BANA explains that on March 9, 2018, Judge Dayton of the Montana Third Judicial District Court granted Rustad's Motion to Dismiss the State Court Action filed against him by BONY. (Doc. 30-1.) Judge Dayton dismissed with prejudice all seven of BONY's claims against Rustad and indicated that all of the claims are time-barred by the applicable statute of limitations. Because Rustad's argument in support of his Motion to Dismiss in this case is due to the similarity of the claims in the State Court Action, there is no longer any basis for this case to be dismissed and combined with the

State Court Action. Consequently, Rustad's Motion to Dismiss is moot. The parties shall continue litigating this case in federal court.

Accordingly, IT IS ORDERED that Rustad's Motion to Dismiss Without Prejudice (Doc. 25) is DENIED AS MOOT.

DATED this 18<sup>th</sup> day of April, 2018.

  
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Dana L. Christensen, Chief Judge  
United States District Court